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DEPARTMENT OF EDUCATION

[Docket ID ED-2012-OESE-0002]

Final revision to selection criteria--Enhanced Assessment
Instruments; CFDA Number: 84.368

AGENCY: Office of Elementary and Secondary Education,
Department of Education.

ACTION: Notice.

SUMMARY: The Assistant Secretary for Elementary and Secondary Education amends the selection criteria under the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grant (EAG) program, as established in the notice of final priorities, requirements, definitions, and selection criteria published in the Federal Register on April 19, 2011 (2011 NFP). The 2011 NFP established specific priorities, requirements, definitions, and selection criteria that may be used for the EAG program. The revisions in this notice provide the Secretary with additional flexibility with respect to selection criteria for EAG competitions in 2012 that use fiscal year (FY) 2011 funds and for subsequent competitions. We believe that these revisions will enable the Department to administer this program more effectively,

simplify the application and review processes, and better ensure that the strongest applications receive EAG funds.

EFFECTIVE DATE: The revisions are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Collette Roney, U.S.

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If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the EAG program is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

Program Authority: 20 U.S.C. 7301a.

We published a notice of proposed revisions for this program in the Federal Register on January 30, 2012 (77 FR 4553). That notice contained background information and our reasons for proposing the revisions relating to the use of selection criteria for this program.

Public Comment: In response to our invitation in the notice of proposed revisions, we did not receive any

comments. However, as a result of our further review of the proposed revisions since publication of the notice of proposed revisions, we have made one change as follows:

Analysis of Comments and Changes:

Comment: None.

Discussion: In reviewing the statement of the proposed revisions to selection criteria further, the Department has decided that it may be helpful to address the assignment of maximum possible points--not only with respect to criteria used for competitions, but also with respect to factors under those criteria. The Department has the authority under 34 CFR 75.201 to assign maximum points at the factor level. This change, therefore, does not substantively change the Department's authority or practice; it merely describes the manner in which the Department may indicate whether factors under a selection criterion have been assigned maximum points.

Changes: We have added language to the statement of revisions to clarify that the Department may assign, in the notice inviting applications, the application package, or both, the maximum possible points an applicant may earn under each factor under a selection criterion.

FINAL REVISIONS TO SELECTION CRITERIA

The Secretary may use one or more of the selection

criteria listed in paragraphs (a) through (d) for evaluating an application under this program. This flexibility includes the authority to reduce the number of selection criteria. In order to assist peer reviewers in determining the degree to which an applicant meets a criterion, the Secretary may further define each criterion from each of these sources by selecting one or more specific factors within a criterion or assigning factors from one criterion, from any of those sources, to another criterion, in any of those sources. We may apply one or more of these criteria in any year in which this program is in effect. In the notice inviting applications or the application package, or both, we will announce the maximum possible points assigned to each criterion and may also assign the maximum possible points for each factor.

Selection criteria for any EAG competition may come from:

- (a) The selection criteria established in the 2011 NFP.
- (b) The selection criteria in 34 CFR 75.210.
- (c) Selection criteria based on the statutory requirements for the EAG program in accordance with 34 CFR 75.209.
- (d) Any combination of selection criteria and factors

in paragraphs (a) through (c).

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use one or more of these selection criteria, we invite applications through a notice in the Federal Register.¹

Executive Orders 12866 and 13563:

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred

¹ Availability of funds for the EAG program for a given year is contingent upon an appropriation of funds for the program by the Congress.

to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden

on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are taking this regulatory action only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Summary of Potential Costs and Benefits

This regulatory action affects only State educational agencies (SEAs) or consortia of SEAs applying for assistance under the EAG program. It creates flexibility for the Department, with respect to EAG competitions in 2012 for FY 2011 funds and for subsequent competitions, to

select from among, or to combine, selection criteria that were established in the 2011 NFP criteria, selection criteria from 34 CFR 75.210, and other selection criteria based on the statute under 34 CFR 75.209. This flexibility allows the Department to align selection criteria with program needs and ensure that the strongest applications are selected for funding under the program.

This flexibility does not impose a financial burden that SEAs would not otherwise incur in the development and submission of a grant application under the EAG program. In addition, under some circumstances (for example, if the Department elected to use fewer criteria or factors in a given competition), the revisions could reduce the financial burden of preparing an EAG grant application by a modest amount. Moreover, the Department typically only receives a small number of applications for this program, which further serves to mitigate any potential costs because few entities are affected.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination

and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the Federal Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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Dated: April 25, 2012

Michael Yudin,
Acting Assistant Secretary for
Elementary and Secondary Education.

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